

SOUTH AFRICA / JUDGMENT

Kaap-Vaal Trust (Pty) Ltd v Speedy Brick & Sand CC (23143/2020) [2021] ZAGPPHC 668 (18 October 2021) [2021] ZAGPPHC 668

COURT

North Gauteng High Court, Pretoria

BEFORE

Collis

CASE / FILE NUMBER

23143/2020

Source: saflii.org · Research copy typeset by Esheria. Not court-issued or certified.

Source record

REPUBLIC OF SOUTH
AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION
PRETORIA)

(1)

REPORTABLE: NO

(2)

OF INTEREST TO OTHER

JUDGES: NO

(3)

REVISED

18

OCTOBER 2021

CASE

NO: 23143/2020

In the matter

between: KAAP-VAAL TRUST
(PTY)
LTD
APPLICANT
and
SPEEDY BRICK &
SAND CC
RESPONDENT
In
re
SPEEDY
BRICK & SAND
CC
APPLICANT
KAAP-VAAL
TRUST (PTY)
LTD
RESPONDENT
This judgment is
issued by the Judge whose name is reflected herein and is submitted
electronically to the parties/their legal representatives
by email.
The judgment is further uploaded to the electronic file of this
matter on Caselines by the Judge or his/her secretary.
The date of
this judgment is deemed to be 18 October 2021.

JUDGMENT

COLLIS J

INTRODUCTION

1. This is an interlocutory application in terms of Rule 30A. On 18 September 2020, the firm Cawood Attorneys (attorneys for the Respondent) served a Notice in terms of Rule 7 on the attorneys for the Applicant, wherein it disputed the authority of Van Der Merwe and Associates to act as attorney of record for the Applicant.[1] In the said notice, Van Der Merwe and Associates, representing Kaap-Vaal Trust (Pty) Ltd were requested to provide the necessary

proof that the said attorney holds authorisation to act on behalf of the Applicant.

2. As there was no compliance to the said Rule 7 notice, Cawood Attorneys (representing Speedy Brick & Sand CC), proceeded to serve a Rule 30A application on Van Der Merwe and Associates on 12 November 2020, wherein they sought an order to compel Van Der Merwe and Associates to comply, by virtue of delivery of evidence with the said Notice in terms of Rule 7 and costs.[2]

3. On 19 November 2020, Van Der Merwe and Associates responded to the said notice by delivering their clients power of attorney, together with a resolution dated and signed 18 November 2020.[3]
4. Cawood Attorneys was not satisfied with the reply so received and proceeded to launch the present Rule 30A application dated 8 December 2020 and served on the Repondent the same day.
5. As per the founding affidavit filed in support of the application and more specifically paragraph 7 thereof, the deponent, Ms Henning sets out the following:

“On 24 November 2020, the Applicant served a Power of Attorney (‘POA2’) and Member’s Resolution on the Applicant. Copies of the aforesaid documents are attached hereto marked “SH4” & “SH5” respectively. Notwithstanding, “PO2” filed together with the Members Resolution, still does not constitute compliance with Rule 7 of the Uniform Rules of Court. The Respondent is in business rescue and the members of the CC do not have the required authorization to take the resolutions relied upon by the Respondent.”

6. In the answering affidavit and more specifically paragraph 16 thereof, the respondent replied as follows:[4]

AD PARAGRAPH 7 THERETO

“16.1 Save for admitting that a further power of attorney and members resolution were served on the Respondent’s attorneys of record on 24 November 2020, I vehemently deny that “ PO2” does not constitute compliance with Rule 7 of the Uniform Rules of Court. In amplification of this denial, I further reiterate that Speedy Brick and Sand CC is not in business rescue and both the Respondent and the Respondent’s Attorneys of record are and should be duly aware of same. I shall give a comprehensive exposition of the background of this matter herein below from which it is evident that this application is baseless, nonsensical, irrational and that it is highly unlikely that the Respondent instructed its attorneys of record to launch this application especially by virtue of the fact that Kaap-Vaal Trust (Pty) Ltd (Gert De Wet) was appointed as a joint provisional liquidator of the insolvent estate of Speedy Brick and Sand CC pursuant to business rescue proceedings of Speedy Brick and Sand CC being terminated and it being placed in provisional liquidation by an order of court under cae number 9000/18 granted on 21 August 2019 which I append hereto marked as Annexure “C”.

16.2 Eventually the Applicant’s business was able to recover to such an extent that it was possible for it to be taken out of liquidation.

16.3 The provisional liquidation order was discharged by an order of court on 26 November 2019. I append this order hereto as Annexure “D”.

7. As per the replying affidavit, the deponent, Ms De Kock, replied to the above, in paragraphs 7 and 8 as follows:[5]

PARAGRAPH 7

“The Respondent ignores the fact that the Respondent is factually still in business rescue as a result of the fact that the liquidation

proceedings had ended. I attach hereto as Annexure “A1” a copy of the company search conducted on the Respondent’s status is, correctly so, indicated to be in ‘business rescue’.

PARAGRAPH 8

“The fact of the matter is that, when the provisional liquidation proceedings ended for the Respondent, The Respondent’s status

reverted to “in business rescue”, which represented the Respondent’s status before the granting of the provisional liquidation order. It is respectfully submitted that the company’s status cannot change from “in business rescue” to “provisionally liquidated”, to the proverbial “business as usual”. The Respondent returned to being in business rescue when the provisional liquidation order was discharged to allow the business

rescue practitioner, who stated that the company was beyond rescue and should be liquidated, to confirm that the company is no longer in financial distress. Any other approach to the legislation governing the position will open the doors for unprecedented abuse of the process to the detriment of the Respondent’s creditors and affected parties.”

ISSUES

FOR DETERMINATION

8. In casu the main issue for determination is therefore whether this Court is satisfied that Van der Merwe & Associates has the necessary authority to act on behalf of the Respondent.[6] In addition and as an ancillary point, the parties also requested the court to determine whether the Respondent is currently in

business rescue (or not). On behalf of the Respondent it was contended that only if the answers to both questions are in the affirmative, can the application succeed, otherwise it stands to be dismissed.

9. As a point of departure, the main issue falls to be determined first, before a determination is made of whether the Respondent is in business rescue or not. In this regard the provisions of Rule 7 of the Uniform Rules of Court should be considered.

10. Rule 7(1) POWER OF ATTORNEY reads as follows:

“(1) Subject to the provisions of subrules (2) and (3) a power of attorney to act need not be filed, but the authority of anyone acting on behalf of a party may, within 10 days after it has come to the notice of a party that such person is so acting, or with leave of the court on good cause shown at any time before judgment, be disputed, whereafter such person may no longer act unless he satisfied the court that he is authorised so to act, and to enable him to do so the court may postpone the hearing of the action or application.” The practice of unnecessarily challenging the authority of individuals to bring applications has been decried.[7]

11. On a mere reading of the Rule 7(1) it is clear that a person's authority to act on behalf of a party may be challenged within ten days after it has come to the notice of a party that such person is so acting. The first question, which then requires an answer, is when notice was obtained by Cawood Attorneys that Van Der Merwe and Associates acts on behalf of the applicant.
12. On behalf of the applicant it was argued that in the main application, the applicant gave its intention to oppose the main application on 29 July 2020.[8] This date is undisputed by the respondent.
13. The Rule 7 notice however, was only served on 18 September 2020, some 37 days after an intention to oppose was delivered and even longer after the applicant became aware that Van der Merwe & Associates is acting on behalf of the respondent.
14. This delay, in challenging the authority of Van Der Merwe and Associates outside of the ten-day period provided for in the rule, the respondent submitted, the applicant did not explain, nor did the applicant request leave from the Court to dispute the authority of Van der Merwe & Associates substantially outside the 10-day period. In addition thereto, the applicant also failed to show good cause for wanting to dispute the authority outside of the time period provided for in terms of the rule.
15. In support of this argument, the respondent relied on the decision made in *South African Allied Workers' Union v De Klerk*,^[9] albeit that the court therein did not make a finding on the failure to lodge the challenge within ten days, as the court in that matter was faced with new proceedings which triggered the 10-day period afresh as the previous authority was merely a general authority to represent the party in legal proceedings.
16. In opposition, the applicant requested the Court, to ignore the applicant's failure to have complied with the provisions of Rule 7. On behalf of the applicant, it was argued, that it was rather in the interest of the parties, that a determination on the merits of the application be made, instead of just on the preliminary point, more so that the preliminary point was also not raised in the opposing affidavit.
17. In the present application, no application for condonation was brought to enable the applicant to dispute the authority of Van Der Merwe and Associates, outside of the ten-day period, nor was leave of the Court on good cause shown sought by the applicant.
18. The point in limine, this Court cannot simply ignore, more so in circumstances where no attempt has been made by the applicant to explain the delay in challenging the authority of the respondent.
19. The 10-day time period within which the authority of another can be challenge, is not merely superfluous. This time period is set, so as to bring certainty to the litigants that no challenge will be mounted against their authority, and where this challenge is mounted outside of the 10-day period on notice, that this challenge can only be mounted with leave of the Court and on good cause shown. The rule thus gives direction and permission that a

challenge can still be mounted outside of this 10-day period, but only with leave of the Court and on good cause shown. In the present instance, no leave was also sought by the applicant.

20. This is not an insignificant point to merely be ignored by a Court, as it would mean, that on a mere whim of an opponent, the mandate of an attorney concerned may be challenged. Where a litigant fails to adhere to any time limit provided for in any rule of court, rule 27(3) specifically permits such litigant to seek condonation for its non-compliance.[10]
21. In the present application, the applicant has failed to request condonation in terms of rule 27(3) and it follows that the applicant cannot be granted relief on the merits in circumstances where it, by itself, is in flagrant disregard of the rules of court.
22. Consequently, the application must therefore fail.

COSTS

23. In as far as costs is concerned, the respondent, if successful, requested the court to consider awarding it costs on an attorney and client scale.
24. On its behalf, it was submitted that attorney and client costs is justified if the court has sight of the reprehensible conduct on the part of one of the parties,[11] or where where a party is vexatious with persistence in futile litigation.[12]
25. Furthermore, it was argued that it has been held that if an application was so lacking in arguable merit, that it merited an attorney-client costs order.[13] The present application it argued, is one such instance.
26. With reference to the appropriate costs order to be awarded in the event of being successful, no punitive cost order was sought by the applicant.
27. I do not believe that a punitive costs order is warranted under the circumstances.

ORDER

28. Consequently, the following order is made:

28.1 The point in limine is upheld.

28.2 The application is dismissed with costs.

COLLIS C

JUDGE OF THE HIGH COURT

Appearances

Counsel for the Applicant : Adv. L.K. Van Der Merwe

Attorney for the Applicant : Cawood Attorneys

Counsel for the Respondent : Adv. H.P. Wessels

Attorney for the Respondent : Van Der Merwe & Associates

Date of Hearing

: 11 May 2021

Date of Judgment : 18 October 2021

Judgment

transmitted electronically

- [1] Annexure J Notice in terms of Rule 7 Index 011-48.
- [2] Answering Affidavit “Annexure P” Notice in Terms of Rule 30A Index 011-63 to 011-64.
- [3] Answering Affidavit “ Annexure Q” Index 011-65 to 011-67.
- [4] Answering Affidavit: Index 011-5 and 6.
- [5] Replying affidavit: Index 033-6 and 7.
- [6] Rule 7(1) is only concerned with the mandate of an attorney to act in instituting or defending legal proceedings on behalf of a party and to act in matters incidental to such proceedings (*South African Allied Workers’ Union v De Klerk* 1990 (3) SA 425 (E) at 436F-J); *FirstRand Bank Ltd v Fillis* 2010 (6) SA 565 (ECP) at 569A.
- [7] *Eskom v Soweto City Council* 1992 (2) SA 703 (W) at 705C and 705H-I.
- [8] Notice of Intention to Oppose: Index 002-1 to 002-2.
- [9] *Supra* in footnote 1 at 436D-E.
- [10] *Dalhousie v Bruwer* 1970 (4) SA 566 (C) at 571E.
- [11] *Delfante v Delta Electrical Industries Ltd* 1992 (2) SA 221 (C).
- [12] *Ernest & Young v Beinash* 1999 (1) sa 1114 (W).
- [13] *Cilliers, Law of Costs*, Chapter 4.13; *Venmop 275 (Pty) Ltd and Another v Cleverlad Projects (Pty) Ltd and Another* 2016 (1) SA 78 (GJ) para [33].

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.saflii.org/za/cases/ZAGPPHC/2021/668.html>

CASE PAGE <https://chat.esheria.ai/case-law/south-africa/kaap-vaal-trust-pty-ltd-v-speedy-unknown-topic-agpphc-2021>

Prepared on 12 October 2026 · Esheria